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No. 73-198

In the
Supreme Court of the United States
OCTOBER TERM, 1973

ROBERT LESLIE ABRAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Robert Leslie Abrams, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 27, 1973.

CITATION OF THE OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix attached hereto, infra, pp. 1a-9a, is unreported at present.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed and entered on March 27, 1973. The Petition for Rehearing was denied on May 31, 1973. This Petition for Writ of Certiorari will be timely filed on or before July 30, 1973, one extension having been granted extending the

time for filing this Petition from June 30, 1973 to July 30, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Whether the finding of the trial court that petitioner received the induction order in question, based solely upon the presumption of receipt from the fact of mailing, as set forth in 32 C.F.R. Section 1641.3, when all other evidence demonstrates that it was not received, makes that presumption irrebuttable and that finding in violation of due process?

II. Whether the decision of the Court of Appeals for the Seventh Circuit in this matter is in conflict with this Court's decision in *Toussie* v. *United States*?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in material part as follows:

> . . . nor be deprived of life, liberty, or property, without due process of law . . .

STATUTES INVOLVED

454(a) 50 U.S.C. App. provides in material part as follows:

> *Training and service in general* . . . every male citizen . . . shall be liable for training and service in the Armed Forces of the United States: provided . . . notwithstanding any other provision of the law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted . . .

462 (a) 50 U.S.C. App. provides in material part as follows:

> ". . . any other person charged as herein provided with the duty of carrying out of any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment . . or a fine . . or by both such fine and imprisonment . . .".

SELECTIVE SERVICE REGULATIONS INVOLVED

32 CFR Section 1632.14 (a)
32 CFR Section 1641.3
32 CFR Section 1642.15

STATEMENT OF THE CASE

On November 18, 1969, Selective Service Local Board No. 151 ordered the Petitioner to report for induction on December 1, 1969. CCA 14.* On December 1, 1969, the Petitioner's induction was postponed by personnel at the induction station, and on December 16, 1969, Local Board No. 151 issued a postponement of induction for the petitioner pursuant to 32 C.F.R. 1632.2 CCA 15.

The purpose of the postponement of induction was to allow for completion of a medical review which was being conducted by the Surgeon General. Transcript Page 126.** The local board postponement of December 16, 1969, was issued *nunc pro tunc* so as to be effective from the date

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*CCA refers to Circuit Court of Appeals Appendix
**"Transcript refers to the Transcript of Proceedings of the District Court in the Record."

of December 1, 1969. The postponement was issued, "until further notice."

On January 27, 1970, local board No. 151 ordered the petitioner to report for induction on February 16, 1970 by letter order. A 16. The petitioner was unable to report for induction on February 16, 1970 because he was confined to the Highland Park Hospital due to an overdose of drugs. CCA 17; Transcript, page 139.

Fred Spanier, the postmaster of the post office of Highland Park, Illinois and Edward Hintzen, the Assistant Postmaster of the post office of Waukegan, Illinois, testified that there was a mail strike, effective in both of their post offices, which commenced approximately 12:01 A.M. on March 22, 1970 and terminated on March 24, 1970 at midnight. Transcript p. 69-82.

The testimony of these two men established that the letter posted in Waukegan, Illinois, which was bound for Highland Park, Illinois would go from the Waukegan Post Office to the post office in Franklin Park then to the Post Office in Highland Park for delivery to the addressee.

Petitioner was indicted by the grand jury on April 8th of 1971, (CCA 4) for failing and refusing to report for induction as ordered in violation of Title 50 App. U.S.C. Section 462. Defendant was granted a bill of particulars (CCA 5) in which the offense was more fully set out. After the trial, the petitioner was found guilty and sentenced to the custody of the attorney general of the United States for a period of three years. On March 27, 1973, the Seventh Circuit Court of Appeals affirmed the decision of the trial court on Appeal. pp. 1a-9a.*** The Petition for Rehearing was filed and denied on May 31, 1973.

*** a refers to the Appendix of this Petition.

REASON FOR GRANTING THE WRIT

I.

This Court is being asked to consider an evidentiary question of great importance in the prosecution of Selective Service indictments, namely, whether 32 CFR, 1641.3, which creates a presumption of the receipt of an induction order upon proof of its mailing, constitutionally allows a trial court to use that presumption alone to find that such an order was received, when all other evidence demonstrates it was not received. Petitioner maintains that such evidentiary use of the presumption creates an irrebuttable presumption in violation of due process.

On March 18, 1970, Local Board 151, ordered the petitioner to report for induction on April 8, 1970, by a letter order. CCA 18. The evidence submitted in the trial indicated that the letter order was in fact mailed. This evidence consisted of a copy of the letter order found in the petitioner's file and a notation in the petitioner's Selective Service file that the original of the letter was mailed on March 18, 1970, Transcript P. 28. Regulation 1641.3 provides in pertinent part as follows:

> "The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

The Government presented no other evidence of the receipt by petitioner of that letter order. By this proof, the Government presented evidence which tended to satisfy the standards for the presumption, described as follows:

> "To indulge this presumption requires the court to find (1) that a communication was properly addressed, (2) with return address and that there was in fact no return thereof to the sender, (3) that it was duly posted, and (4) that postage was prepaid, this latter not required of course with government mail." *United States* v. *Levin*, 326 F. Supp. 1069 at 1072 (D. Minn. 1971)

The testimony and evidence offered by petitioner established that the petitioner did not receive the induction order issued by Local Board 151 on March 18, 1970. The petitioner testified that he did not receive it and was not aware of its existence until September 17, 1970. Transcript p. 145. Although the letter order of March 18, 1970, was addressed to the petitioner at the address of his parents, his parents testified that they did not receive that letter and that they were not aware that the petitioner was considered to be delinquent in any way until they received a letter from the Federal Bureau of Investigation dated July 24, 1970. CCA 19; Transcript pp. 87-122. The testimony of the postmasters regarding the mail strike clearly supports the testimony of the petitioner and his parents. Transcript pp. 69-82.

Certainly in this case there was no proof beyond a reasonable doubt that the petitioner received a letter order or notice of a letter order prior to April 8, 1970. The petitioner presented substantial evidence rebutting the government's presumption that he received the letter order, and the government introduced no other evidence to prove that he did receive the letter order. It would be virtually impossible to prove with any greater certainty that a communication was not received through the mails. The very non-existence of the communication itself renders any greater degree of proof very difficult.

Selective Service Regulation 1641.3 provides that there is a *rebuttable* presumption that the mailing of an induction order by a local board is Proof of Receipt by the registrant. *United States* v. *Bowen,* 414 F.2d 1268, 1273, (3rd Cir. 1969); *United States* v. *Levin,* 326 F. Supp. 1069 (D. Minn. 1971); *United States* v. *Garrity,* 433 F.2d 649 (8th Cir. 1970), remanded on other issues, 397 U.S. 48. *See also Wigmore on Evidence,* §95, 1940 Ed.[1] Once the presumption is rebutted, the burden of proof shifts to the government to show that the induction order was actually received. *United States* v. *Smith,* 308 F. Supp. 1262 (S.D. N.Y. 1969). See also *Garrity, supra; Levin, supra.*

In *United States* v. *Smith,* 308 F. Supp. 1262 (S.D.N.Y. 1969), the only evidence presented by the registrant was his own testimony that he had not received the correspondence, and the Court held that the presumption was overcome. Citing the failure of the government to present additional evidence of receipt, the Court concluded that the order had not been received. As the Court in *Levin, supra* held "[W]hen a presumption is rebutted by affirmative evidence of no receipt, i.e. Defendant's testimony, the presumption disappears." 326 F. Supp. at 1072.

In upholding the trial court, the Court of Appeals for the Seventh Circuit stated:

> "We are of the opinion after considering the evidence preserved in the record of the proceedings below and the presumption of receipt of Selective Service mailing

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[1] It has recently been suggested by the Tenth Circuit that the regulatory presumption of 1641.3 is unconstitutional because it appears to be irrebuttable. The Court would let the presumption rest entirely upon the principle espoused by Dean Wigmore. *United States* v. *Perry,* .... F.2d ...., 6SSLR 3151 (10th Cir. No. 72-1456, March 1, 1973).

provided in 32 C.F.R. §1641.3 relied upon by the trial court, that the evidence was sufficient for said court to conclude that defendant received the order." (4a).

Since the only evidence of receipt offered by the government was the proof of the mailing of the letter order dated March 18, 1970, all that the trial court could rely upon was the presumption stemming from that proof. Since that presumption was entirely rebutted by the testimony of petitioner's witnesses, the presumption had disappeared. The net result of the opinion by the Court of Appeals was to make the presumption irrebuttable.

The petitioner has no quarrel with the presumption so long as it is rebuttable, on the basis of the "rational connection" test as formulated by this Court. *Tot* v. *United States,* 319 U.S. 463, (1943); *Leary* v. *United States,* 395 U.S. 6 at 36 (1969). As applied below, this presumption is irrebuttable and, thereby deprives petitioner of fundamental due process as guaranteed by the Fifth Amendment of the United States Constitution.

Accordingly, petitioner respectfully requests that this Court issue its Writ of Certiorari in order that it might decide this important question of constitutional law.

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[2] The court's assertion at p. 4 of its opinion that the Waukegan postmaster testified that: ". . . a letter mailed in the vicinity of the defendant's local board before 5:00 P.M. on March 19, 1970 would not have been delayed as a result of the work stoppage" (Slip opinion p. 4) is an erroneous reading of the record. The officer testified only that the work stoppage would not have delayed the dispatch of the letter from the Waukegan post office to the intermediate station where it would have been further processed and sent to the Highland Park Post Office *if the mails had been functioning properly.*

II.

This Court is being asked to consider an important question of federal law, namely whether the decision of the Court of Appeals below is in conflict with this Court's decision in *Toussie* v. *United States,* 397 U.S. 112 (1970).

Petitioner was indicted under Section 12 of the Military Selective Service Act of 1967, 50 App. U.S.C., Section 462 (1967) which sets forth in general terms that non-compliance with any of the provisions of the Act is punishable by criminal penalty. Nothing in Section 12 purports to make the failure to comply with any other provisions of the Act a continuing criminal offense. The prosecution below was predicated upon failure to comply with Section 4(a) of the Act, 50 App. U.S.C. §454(a); and if there is any authorization for holding the failure to report for induction to be a criminally punishable, continuing offense it must be derived from Section 4(a).

The ambiguous language of 50 App. U.S.C. Section 454(a) (1967), is not sufficient to impose a continuing duty, failure to comply with which is criminally punishable. The pertinent provisions of this statute read as follows:

> Section 454 (a). *Training and Service in General* . . . every male citizen . . . shall be liable for training and service in the Armed Forces of the United States: provided . . . notwithstanding any other provision of the law, any registrant who has failed or refused to report for induction shall continue to *remain liable* for induction and *when available shall be immediately inducted* . . . (emphasis added)

The statutory liability is given effect by Selective Service Regulation 1632.14(a) which states in relevant part:

> "Regardless of the time when or the circumstances under which a registrant fails to report when it is

> his duty to do so, it shall thereafter be his continuing duty to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

There is an additional attempt to implement the statute through Selective Service Regulation 1642.15 which recites in pertinent part as follows:

> Regardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an order to report for induction (SSS Form 252) or pursuant to an order for Transfer Man To Report for Induction (SS Form 243), or fails or has failed to report for civilian work and statement of employer (SS form 153), it shall thereafter be his continuing duty from day to day to report for induction or civilian work in lieu of induction to his own local board and to each local board, whose area he enters or in whose area he remains.

Since the statute does not state the duty as a continuing one, the regulation by itself cannot make it a continuous event. In *Toussie* v. *United States*, 397 U.S. 112 (1970), this Court refused to find that the duty to register with the Selective Service System was a continuing offense in absence of clear language in the statute making the offense a continuing one, even though a Selective Service System regulation purported to make a duty to register a continuing duty:

> . . . While it is true that the regulation does in explicit terms refer to registration as a continuing duty, we cannot give it the effect of making this criminal offense a continuing one. Since such offenses are not to be implied except in limited circumstances, and since questions of limitation are fundamentally matters of legislative not administrative decision, we think

> this regulation should not be relied upon effectively to stretch a five year statute of limitations into a 13 year one, unless the statute itself, apart from the regulation, justifies that conclusion. 397 U.S. 112, 120-121

Certainly, no more than in the *Toussie* situation, does the language of the statute in question in the instant case, which provides for a duty to report and also invokes a continuing liability for induction with the provision that the registrant once ordered for induction may be reordered for induction, allow the administrative agency to expand the offense into a continuing one. More properly the very language of the statute itself implies an affirmative duty on the part of the Selective Service System rather than on the registrant. The registrant is *liable* "and shall be *immediately inducted*", but nowhere does the statute state that the registrant shall be held to be continuingly committing an offense once he has failed to report for induction. The very wording of the indictment infers that there must be an affirmative act by the Selective Service System. ". . . Robert Leslie Abrams . . . who . . . was ordered to report . . . did *then and there* willfully and knowingly neglect, fail and refuse to report . . . *as ordered*. . . ." CCA 4 [emphasis added]. This indictment refers to the specific order of March 18, 1970, which by its terms orders the defendant to report on April 8, 1970 and on no other day before or after.

This type of construction of the statute does not place any under burden on the Selective Service System. All that it requires is that there be a showing that a registrant has failed to report for induction as ordered and has no defenses to that accusation. If a registrant has a timely defense as defendant did for the day of induction, the System is simply required to issue another induction

order. However, to hold that this offense is a continuing one, puts the Selective Service registrant at a significant disadvantage. Without requiring him to report at a specific time to a specific place, the Selective Service System attempts to invoke criminal liability, where Congress has authorized none. The registrant is, therefore, not only uncertain as to what is required of him, he is unable to prepare any defense to possible prosecution. Furthermore, without the type of construction urged by the defendant a registrant would become subject to criminal prosecution for a nonfeasance which is nowhere supported in the statute pursuant to which the regulation is written. And of course, the injustice most strongly urged by this Court in *Toussie* is that a registrant would be perpetually subject to prosecution for failure to perform an act which he has not been specifically directed to perform.

The Court of Appeals for the Seventh Circuit erroneously concluded that the petitioner was arguing that the regulations requiring a registrant to have a continuing duty to report after the day scheduled for induction were not authorized by statute and made reference to footnote 17 of the *Toussie opinion.* 6a. This was not the contention of the petitioner below and is not the contention of the petitioner in this Court. Petitioner's position is that while the Selective Service System may require by regulation that a registrant is under a continuing duty to report to his local board after the day for induction has passed, in order that he may resolve his status, Section 454(a) has no unambiguous language which can be construed to make the failure to report for induction a continuing criminal offense. Since the language is, at best, ambiguous on that question, this Court's decision in *Toussie* applies. Under Section 462 and Section 454(a), the only act that

is punishable by statute is the failure to report for induction on the day certain set forth in a valid order issued by a Selective Service Local Board.

Accordingly, petitioner requests that this Court issue its Writ of Certiorari in order that it might decide this important question of federal law.

CONCLUSION

For the reasons severally and collectively assigned here it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

SEPTEMBER TERM, 1972 — JANUARY SESSION, 1973

No. 72-1370

UNITED STATES OF AMERICA
Plaintiff-Appellee,
v.
ROBERT LESLIE ABRAMS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 CR 373

ALEKANDER J. NAPOLI, *Judge.*

ARGUED: JANUARY 17, 1973 — DECIDED: MARCH 27, 1973

Before DUFFY, *Senior Circuit Judge,* KILEY and STEVENS, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* A grand jury indictment was returned in April 1971 charging defendant Abrams with a one count violation of 50 U.S.C.App. §462, that on or about April 8, 1970 and continuing to and including the date of the indictment, Abrams wilfully and knowingly neglected, failed and refused to report for induction as ordered. A jury was waived. The trial judge found defendant Abrams guilty as charged and he was sentenced to the custody of the Attorney General for a term of three years.

The evidence adduced at trial revealed that defendant was ordered to report for induction on three separate occasions by Local Board No. 151, Waukegan, Illinois. On November 18, 1969, Abrams was ordered to report for induction on December 1, 1969. On December 1, 1969, defendant's induction was postponed "until further notice" pursuant to 32 C.F.R. §1632.2.

The reason for the postponement of induction was to allow completion of a medical review of the defendant at his request which was then being conducted by the Surgeon General. A postponement order dated December 16, 1969 was issued by the local board *nunc pro tunc* so as to be effective from the date of postponement, December 1, 1969.

A second order for induction dated January 27, 1970 was mailed to defendant ordering him to report on February 16, 1970. Reference to his prior order was included in the new order. Abrams failed to report as ordered, but telephoned the local board on the afternoon of February 16th informing them that he failed to appear for induction because at the time he was being treated in the Intensive Care Unit of the Highland Park Hospital for an overdose of drugs. The local board requested that he tender an explanatory letter to them which request he fulfilled on February 18th. The local board also received a substantiating letter from one Dr. Rosenberg stating that defendant had been treated for an overdose of sleeping pills on the 16th of February.

A third order for induction dated March 18, 1970 was mailed to the defendant at 1055 County Line Road, Highland Park, Illinois, which was the last address the defendant supplied to his local board. This order made reference to the previous induction date of February 16, 1970 and instructed the defendant to report on April 8, 1970. Defendant Abrams failed to report as ordered.

The F.B.I. entered the case to determine why defendant had not reported as requested. In July 1970 the

Bureau wrote to defendant's father indicating that defendant was delinquent with his local board. On August 18, 1970, Agent Kneibert visited the Abrams' home and was informed that defendant was located in Ann Arbor, Michigan but was expected to return within a month. Agent Kneibert instructed the parents to have defendant call the F.B.I. on his return.

Defendant returned home on September 7, 1970 but failed to contact the F.B.I. Agent Kneibert then visited defendant at his home on September 17, 1970 and informed him of the outstanding order to report. Defendant admitted he received the two previous orders but denied receipt or knowledge of the order of April 8, 1970. At this interview, Agent Kneibert asked defendant what his action would be if future induction notices were sent to him. Defendant indicated that he would require the assistance of counsel before he could reply to such a question.

Abrams was arrested on October 7, 1970 by the F.B.I. and the indictment was returned in April 1971. From the record, it is evident that at no time after February 1970 did defendant attempt to contact his local board.

I.

The principal defense propounded by the defendant at trial and in issue on appeal was that he was not in receipt of the order of induction mailed on March 18, 1970. The trial court made a finding contrary to this contention to the effect that given the fact that the third notice was mailed to the last address supplied by the defendant to his local board, and that such letter was not returned to the board, the presumption of regularity of board procedures and mailing attested to the receipt of the notice of induction by defendant Abrams. On appeal, despite the finding to the contrary by the trial court, defendant argues that he presented sufficient evidence at trial to rebut the presumption of receipt, thereby rendering the trial court's finding erroneous.

Defendant produced evidence that from Saturday March 21, 1970 at midnight until Monday, March 24, 1970, at midnight, there was a work stoppage at the Highland Park Illinois Post Office and after delivery of mail was resumed, four days were required to distribute accumulated mail.

There was also testimony of a two-day work stoppage at Waukegan in which city the office of defendant's draft board was located. However, the officer in charge at the Waukegan Post Office testified that there was no accumulation of out-going mail during the work stoppage. The officer also testified that a letter mailed in the vicinity of the defendant's local board before 5:00 p.m. on March 19, 1970 would not have been delayed as a result of the work stoppage.

Defendant's father and mother both testified to the effect that no communication had been received from the draft board concerning their son's selective service status between February 1970 and July 1970 when they were contacted by the F.B.I.

The government offered as evidence the testimony of Theolene Dixon, secretary to the Local Board Operations in Chicago who stated at trial that the third induction notice had been mailed to defendant on March 18, 1970 to his last known address.

Although defendant Abrams insists that he never received the induction order dated March 18, 1970, nevertheless we must accept the findings of the trial court to the contrary unless they are clearly erroneous. *United States* v. *Keefer*, 464 F.2d 1385 (7 Cir., 1972); *United States* v. *Ganter*, 436 F.2d 364, 368 (7 Cir., 1970).

We are of the opinion after considering the evidence preserved in the record of the proceedings below and the presumption of receipt of Selective Service mailings provided in 32 C.F.R. §1641.3 relied upon by the trial court, that the evidence was sufficient for said court to conclude that defendant received the order.

Furthermore, regardless of defendant's claim of non-receipt of the letter order, further notice of the order was provided to Abrams in person by Agent Kneibert on September 17, 1970. Such notification by itself coupled with defendant's subsequent inaction would be sufficient evidence to sustain a conviction for failure to report for induction. *United States* v. *Williams,* 433 F.2d 1305 (9 Cir., 1970).

II.

A second argument raised by defendant on appeal is whether the offense of failure to report for induction imposes a continuing duty to report after non-compliance with an outstanding induction order. Defendant argues that the statutory mandate of 50 U.S.C.App. §454(a) is insufficient to impose a continuing duty to report. Abrams relies on *Toussie* v. *United States,* 397 U.S. 112 (1970) in support of his position and analogizes the continuing duty to register considered in that case to the continuing duty to report in issue before us.

The government argues that the law which upholds the continuing offense theory for refusing induction is not affected by the *Toussie* decision because of the fundamental distinction between the statutes and policies involved in the *Toussie* case and in the case at bar. We agree. In *Toussie,* the narrow issue before the Supreme Court was whether for the purpose of tolling the statute of limitations, the obligations of refusing to register for the draft is a continuing one, so that an indictment returned 8 years after defendant Toussie's 18th birthday would not be barred.

In *Toussie,* a decision in favor of the government would have had the effect of permitting an indictment to be brought against a person who had failed to register any time from his 18th birthday to his 31st birthday. The court held that such a result should not be reached ". . . unless the statute itself, apart from the regulation, justified that conclusion". 397 U.S. at page 121.

We hold contrary to the contention of the defendant that *Toussie* applies to the case at bar. As our court stated in *United States* v. *Bruckman*, 466 F.2d 754 (7 Cir., 1972) at page 757, in a similar challenge to the continuing duty to report,

> "In the case before us, however, there is no statute of limitations problem. We are not presented with the 'compounding of a single offense into a multitude for purposes of avoiding the statute of limitations.' *Williams supra*, 433 F.2d at 1306. Furthermore, the Court in *Toussie* did not, as Bruckman contends, invalidate the continuing duty regulation.
>
> As the Court in *Owens* stated, 431 F.2d at 351:
>
> > The Court did not . . . outlaw the continuing duty regulation; rather, it explicitly expected it from the sweep of the opinion.
>
> The exception referred to was footnote 17 in *Toussie*:
>
> > We do not hold that as the dissent seems to imply . . . that the continuing duty regulation is unauthorized by the Act. All we hold is that neither the regulation nor the Act itself requires that failure to register be treated as the type of offense that effectively extends the statute of limitations. 397 U.S. at 121, n. 17, 90 S. Ct. at 864."

We are of the opinion that a registrant who fails to report for induction as ordered is under a continuing duty thereafter to report, thereby precluding defendant's challenge to the continuing duty to report herein. *United States* v. *Bruckman, supra; Silverman* v. *United States*, 220 F.2d 36 (8 Cir., 1955); *United States* v. *Williams, supra; United States* v. *Preston*, 420 F.2d 60 (5 Cir., 1969); *Simmons* v. *United States*, 406 F.2d 456 (5 Cir., 1969); *White* v. *United States*, 403 F.2d 1005 (8 Cir., 1968).

III.

A third issue raised by defendant on appeal concerns the quantum of proof necessary to establish the criminal intent for an offense under the applicable statute. Defendant asserts that the government failed to prove that he wilfully and knowingly failed to report for induction beyond a reasonable doubt.

As we have previously determined in this case, the trial court properly held that Abrams was in receipt of his March 18th induction order. Furthermore, it is established from the record that he failed to report or contact his board after actual notice of induction was received from Agent Kneibert. The last time defendant did, in fact, contact his draft board before his indictment was on February 20, 1970 concerning his second postponement of induction.

Given the facts and circumstances of this case, we are of the opinion that the evidence adduced by the government was adequate to support a finding by the trial court with respect to defendant's knowing and wilful failure to report. Defendant's claim that his failure to report was "inadvertent" relying on *United States* v. *Rabb,* 394 F.2d 239 (3 ir., 1968) is negated by the fact that even after actual notice was provided, he failed to report. We hold that viewing the evidence in a light most favorable to the government, the trial court properly found the evidence sufficient to prove defendant's criminal intent, that he knowingly and willingly failed to report for induction. *United States* v. *Ebey,* 424 F.2d 376 (10 Cir., 1970). See also *United States* v. *Williams,* 421 F.2d 600 (10 Cir., 1970).

IV.

The last argument advanced by defendant on appeal is that the last two induction orders mailed January 27, 1970 and March 18, 1970 respectively were invalidated by the failure of the local board to comply with the Selective Service Regulations applicable to postponement of induction. Defendant contends that the postponement of

December 16, 1969 of his initial December 1, 1969 induction date, *nunc pro tunc,* extended over 60 days until his second induction date of February 16, 1970 and hence violated 32 C.F.R. §1632.2(a). Abrams additionally argues that the postponement regulation (§1632.2) was also violated because more than 120 days, the maximum allowable postponement, elapsed between December 1, 1969 and April 8, 1970.

With respect to defendnt's first claim that more than 60 days had run between his first induction date and the corresponding postponement and his second date of induction, it is settled that only delays attributable to administrative inertia or undue delay in processing on the part of the draft board may warrant invalidation of an induction order.[1] Where delays occur at the request or for the benefit of a registrant or inductee, such delays may not be challenged except for the exceptional case where the delay causes undue prejudice to a registrant. Here, it is quite evident that the initial postponement was for the benefit of the registrant and was instigated by him to process late-filed medical claims. Thus the delay was for his own benefit and may not be raised on appeal as a claim of procedural error, necessitating a cancellation of an induction order. *United States* v. *Foster,* 439 F.2d 29, 31 (9 Cir., 1971); *United States* v. *Bell,* ..... F.2d ..... (7 Cir., 1973) No. 71-1606, February 27, 1973.

Furthermore, upon considering defendant's related claim that a postponement of 120 days elapsed between his initial induction and the third date of induction, it is well

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[1] While the government asserts the time interval between the date of postponement and the second date of induction was exactly 60 days (December 16, 1969-February 16, 1970) we note that the postponement was issued *nunc pro tunc* which reverts said order to the December 1, 1969 date. Therefore, the statutory period commenced on December 1, 1969 and if such a postponement were not for the benefit of the defendant, a procedural violation possibly could be asserted.

established that the 120 day limitation does not apply to a registrant who has failed to appear for and submit to induction. *United States* v. *Bell, supra; United States* v. *Brunner,* 457 F.2d 1301 (9 Cir., 1972); *United States* v. *White,* 447 F.2d 1124 (9 Cir., 1971), cert. denied 404 U.S. 1049 (1972). Here there was no need for a further postponement nor does defendant have access to a claim of an excessive period of postponement when in fact he failed to appear for the scheduled induction on February 16, 1970. *United States* v. *White, supra.*

Defendant's reliance on *United States ex rel. Iverson* v. *Rhodes,* 465 F.2d 402 (7 Cir., 1972) is misplaced. The facts in that case depicting inexcusable administrative inertia are easily distinguishable from the case at bar where any delay in the induction process was a consequence of the defendant's own design.

For the reasons hereinbefore discussed, the judgment of conviction of the District Court is

AFFIRMED.

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

OCTOBER TERM, 1972, SEPTEMBER SESSION, 1973

No. 72-1370

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT LESLIE ABRAMS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(71 CR 373)

March 27, 1973

This cause came on to be heard on the briefs and transcripts of the record from the United States District Court for the Northern District of Illinois, Eastern Division and was argued by counsel.

On consideration whereof; it is ordered and adjudged by this Court that the judgment of the said District Court in this case appealed from be and the same is hereby affirmed, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604
May 31, 1973

Before

Hon. F. RYAN DUFFY, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 72-1370 *vs.*
ROBERT LESLIE ABRAMS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division
(71 CR 373)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and majority of the members of the panel having voted to deny a rehearing.

It is ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

SELECTIVE SERVICE REGULATIONS INVOLVED

PART 1641—NOTICE

1641.1 Notice of Requirements of Military Selective Services Act of 1967.—Every person shall be deemed to have notice of the requirements of the Military Selective Service Act of 1967, upon publication by the President of a proclamation or other public notice fixing a time for any registration. This provision shall apply not only to registrants but to all other persons.

1641.2 Failure To Take Notice.—(a) If a registrant or a person required to present himself for and submit to registration fails to perform any duty prescribed by the selective service law, or directions given pursuant thereto, within the required time, he shall be liable to fine and imprisonment under section 12 of the Military Selective Act of 1967.

(b) If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege.

1641.3 Communication by Mail.—It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not.

1641.5 Classification Record (SSS Form 102).—The Classification Record (SSS Form 102) shall be open to the public at the local board office. It shall be the duty of each registrant to keep himself informed of his status, and any entry concerning him on the Classification Record (SSS Form 102) shall constitute due legal notice thereof to him and to all other interested persons.

1641.6 Computation of Time.—The period of days allowed a registrant or other person to perform any act or duty required of him shall be counted as beginning on the day following that on which the notice to him is posted or mailed.

1641.7 Reporting by Registrants of Their Current Status.—(a) It shall be the duty of every classified registrant to keep his local board currently informed of his occupational, marital, family, dependency, and military status, of his physical condition, of his address, and of his receipt of any professional degree in a medical, dental, or allied specialist category. Every classified registrant shall, within 10 days after it occurs, report to his local board in writing every change in such status and in his physical condition and home address and his receipt of any such professional degree.

(b) A classified registrant shall submit to his local board in writing all information which the local board may at any time request from him concerning his occupational, marital, family, dependency, or military status or his physical condition or his receipt of a professional degree. The registrant shall submit such information to his local board within 10 days after the date on which the local board mails him a request therefor, or within such longer period as may be fixed by the local board.

INDUCTION

1632.14 Duty of Registrant to Report for and Submit to Induction.—(a) When the local board mails to a registrant an Order To Report for Induction (SSS Form 252) or an Order for Transferred Man To Report for Induction (SSS Form 253), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuing duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction as such time and place as may be fixed by the

local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

1642.15 Continuous Duty of Certain Registrants to Report for Induction.—Regardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction (SSS Form 252) or pursuant to an Order for Transferred Man to Report for Induction (SSS Form 253), or fails or has failed to report for civilian work in lieu of induction pursuant to an Order to Report for Civilian Work and Statement of Employer (SSS Form 153), it shall thereafter be his continuing duty from day to day to report for induction or for civilian work in lieu of induction to his own local board, and to each local board, whose area he enters or in whose area he remains.

FILED
OCT 2 1973
MICHAEL RODAK, JR., CLERK

No. 73-198

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT LESLIE ABRAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-198

ROBERT LESLIE ABRAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In April 1971, a grand jury in the Northern District of Illinois returned an indictment which charged that on or about April 8, 1970, and continuing to and including the date of the indictment, petitioner had failed to report for induction into the United States Armed Forces, in violation of 50 U.S.C. App. 462(a). After a jury-waived trial, petitioner was convicted as charged and sentenced to three years' imprisonment. The court of appeals affirmed in a lengthy opinion (Pet. App. A).

Petitioner argues (1) that the district court erred in basing guilt solely on a finding that he received a letter from his draft board ordering him to report for induction, in the face of contradictory evidence; and (2) that this Court's decision in *Toussie* v. *United States*, 397 U.S. 112, requires reversal of his conviction, on the

ground that failure to report for induction is not a continuing offense. Both these contentions are answered in the opinion of the court of appeals, upon which we rely. We note further as to the first claim that the court of appeals examined the evidence and concluded on this factual issue that the ruling of the trial court was not clearly erroneous (Pet. App. 3a-4a), The court of appeals did not hold that the presumption of regularity was unrebuttable; it merely held that the trial court was justified in finding petitioner's evidence not sufficient to constitute rebuttal.

With respect to petitioner's second claim, we deem it appropriate to make the following additional observations:

In *Toussie, supra,* the defendant was convicted of having failed to register with his draft board within five days of his eighteenth birthday, which occurred in 1959. Despite a five-year statute of limitations, the defendant had not been indicted until 1967. This Court, after reviewing the history of Presidential proclamations setting specific dates for selective service registration, held that although there was, under selective service regulations, a continuing duty to register, the statute of limitations began to run five days after the defendant's eighteenth birthday and barred the prosecution. 397 U.S. at 121, n. 17.

Since the instant case involves no statute of limitations problem, petitioner's reliance upon *Toussie* is misplaced. See *United States* v. *Bruckman,* 466 F. 2d 754, 757 (C.A. 7). This Court's holding in *Toussie* was grounded on a reading of Presidential proclamations on draft registration and was limited to prosecutions for failure to register. Petitioner argues by attempted analogy to *Toussie* that there is no continuing duty to

report for induction. As noted, this Court in *Toussie* did not invalidate the continuing duty regulation, but merely held that it could not be used to extend the statute of limitations. See 397 U.S. at 121, n. 17; *United States* v. *Owens*, 431 F. 2d 349, 351 (C.A. 5); *United States* v. *Williams*, 433 F. 2d 1305, 1306 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.